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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951 A. D.

No. 685

THOMAS EDWARD FURLONG, HARRY SCOTT KNEEVERS and CHARLES JOSEPH SWARTZ,
*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners, Thomas Edward Furlong, Harry Scott Kneevers and Charles Joseph Swartz, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on January 15, 1952 A.D., and the order of said Court denying rehearing in said cause entered on March 4, 1952 A.D.

## OPINIONS BELOW.

The District Court entered no opinion. The opinion of the Circuit Court of Appeals (R. 350-356) has not yet been reported.

## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 15, 1952 A.D. (R. 356). Thereafter a Petition for Rehearing (R. 357-366) was filed with said Court on January 31, 1952 A.D., and an order denying said petition (R. 367) was entered by said Circuit Court of Appeals on March 4, 1952 A.D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED.

1. When a jury reports itself deadlocked after only three and one-half hours deliberation in a case involving four defendants, six distinct offenses, and seven days of trial, does a supplemental instruction that the minority of the jury should reconsider their decision, since the majority has arrived at a contrary conclusion, unduly coerce and influence the jury?

2. Where the trial judge did not give counsel an opportunity to object to a supplemental instruction before the jury left the box, and indicated, in deciding the motion for new trial, that he believed that counsel had been given adequate opportunity to object to the instruction before it was given, does the absence of a specific objection to a portion of the instruction bar review of its correctness, under Rule 30 of the Rules of Criminal Procedure?

3. In the absence of a specific objection, is a Court of Appeals without discretion, under Rule 30 of the Rules of Criminal Procedure, to consider the coercive effect of an instruction urging the minority of the jurors to reconsider, and directing the jury to continue their deliberations until they arrive at a unanimous verdict?

4. Does an instruction, urging the minority of the jury to reconsider their decision, since the majority has arrived at a contrary conclusion, and directing the jury to continue their deliberations until they arrive at a unanimous verdict, coerce the individual jurors into surrendering their honest convictions?

## RULES INVOLVED.

Rule 30 and Rule 52(b) of the Federal Rules of Criminal Procedure are reprinted in Appendix A, *infra*, p. 1a.

## STATEMENT.

This action was brought on an indictment returned by the January 1951 Grand Jury for the Northern District of Illinois charging petitioners, or some of them, together with one Daniel Anthony Burns, with five distinct violations of Title 18, U.S.C., Section 912, obtaining money by impersonating Federal Officers and with violation of Title 18, U.S.C., Section 371, conspiracy to violate Section 912 of said Title (R. 3-5). The matter was tried before the Honorable William J. Campbell in the United States District Court for the Northern District of Illinois, sitting with a jury, on May 8, 1951 through May 11, 1951 and May 14th and 15th, 1951 (R. 6-293).

On May 16, 1952 Judge Campbell instructed the jury, who retired to the jury room at 11:10 A.M. After the jury had retired, there ensued a colloquy between the judge and counsel concerning dismissing the jury and the giving of supplemental instructions, which resulted in the judge instructing counsel to return to the court room at three o'clock in the afternoon to confer on the possibility of giving the *Allen* instruction, if the jury had not returned prior to that time. Judge Campbell then explained that he had reserved his ruling on the motion for

a judgment of acquittal on behalf of the defendant, Daniel Anthony Burns, until after the jury had retired in order to avoid unduly influencing them. He then granted the motion with respect to said defendant (R. 293-295).

At three o'clock of the same day when all counsel appeared in Judge Campbell's chambers, they were informed that the foreman of the jury had requested that the Judge be told that the jury was "hopelessly deadlocked." After commenting that the jury could not have gone over all of the evidence in the case, the Judge announced his intention to give the charge in the *Allen* case to which Mr. McAdams, on behalf of the defendants, objected. After discussion of the questioning of the jury and the entry of an order providing for a sealed verdict in case the jury returned after 4:00 P.M., (R. 295-298) the Judge resumed the bench and, the jury being summoned, gave the supplemental charge approved in *Allen* v. *United States,* 164 U. S. 492, 501 (1896), (R. 298-300) concluding with the words, not appearing in the charge approved in the *Allen* case:

> "With that admonition you are directed to continue with your deliberations until you arrive at a unanimous verdict. You will again retire to your jury room and continue your deliberations."

Immediately thereafter the jury retired and the Court declared a recess (R. 300).

On May 17, 1951 the verdict of the jury, which had been returned sealed at 7:40 P.M. on May 16th, was read in open Court, finding Petitioner Furlong guilty on counts 1, 2 and 6 of the indictment and not guilty on counts 3, 4 and 5; Petitioner Kneevers guilty on counts 1, 2 and 6 and not guilty on counts 3 and 4, and Petitioner Swartz guilty on counts 1, 2 and 6 and not guilty on count 3 (R. 301).

On May 22, 1951 counsel filed a motion for a new trial on behalf of petitioners, points 18, 19 and 20 of which (R. 307-308) challenged the propriety of giving the supplemental instruction, the propriety of the closing phrases of that instruction, and the propriety of allowing the jury to retire before giving counsel for the petitioners an opportunity to object after the charge was given. All pending motions, including the motion for new trial, were heard and denied on June 1, 1951 (R. 340), the Judge commenting with respect to the giving of the *Allen* charge that an adequate opportunity for objection had been given (R. 337). Judgment was then entered on the verdict and each of the defendants sentenced to three years in the custody of the Attorney General (R. 341).

On appeal, the Court of Appeals for the Seventh Circuit held that it was without power, under Rule 30 of the Rules of Criminal Procedure, to consider the allegation that the phrase directing the jury to deliberate until it arrived at a unanimous verdict coerced the individual jurors since a specific objection had not been made before the jury retired after the giving of this instruction, and that the giving of the supplemental instruction was not an buse of discretion (R. 351-353). Since the issue concerning the effect of Rule 30 had not been raised prior to the filing of the opinion, a Petition for Rehearing was filed, contending that Rule 30 was not applicable because of the fact that the trial judge directed the jury to retire without giving counsel an opportunity to object to the instruction as given, and that the Court of Appeals could, in its discretion, consider the question regarding the effect of the instruction without specific objection (R. 357-366). This petition was denied, without further opinion, on March 4, 1952 (R. 367).

## SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the lack of a specific objection to the phrase in the supplemental instruction, directing the jury to continue their deliberations until they reached a unanimous verdict, precluded review of the question of whether that phrase unduly coerced the individual jurors into surrendering their honest opinions.

2. In holding that it has no discretion to consider the objection to the supplemental instruction above-mentioned in the absence of a specific objection.

3. In failing to exercise its discretion under Rule 30 and Rule 52(b) of the Rules of Criminal Procedure to consider the supplemental instruction in the absence of a specific objection thereto.

4. In holding that the votes of the jurors indicated a lack of coercion.

5. In failing to hold that the addition of the phrase directing the jury to continue its deliberations until it arrived at a unanimous verdict unduly coerced the individual jurors into surrendering their honest opinions.

6. In failing to hold that the giving of the supplemental instruction, under all of the facts and circumstances of the case, constituted an abuse of discretion.

7. In holding that the giving of the supplemental instruction after three and one half hours of deliberation was not an abuse of discretion.

8. In failing to hold that the failure of the Trial Judge to afford counsel for petitioners an opportunity to object to the supplemental instruction before the jury left the

box was error under Rule 30 of the Federal Rules of Criminal Procedure.

9. In affirming the judgments of the District Court.

## REASONS FOR GRANTING THE WRIT.

1. In holding that the Trial Court did not abuse its discretion, the Court of Appeals added to the confusion concerning the limits of discretion in connection with the giving of the supplemental instruction approved in *Allen* v. *United States,* 164 U.S. 492, 501, and misapplied the decision of this Court in *Allis* v. *United States,* 155 U.S. 117; this instruction is so crucial in criminal cases that the circumstances under which it may be given are a question of great importance in the fair and impartial administration of justice, requiring clarification by this Court.

(a) There is considerable confusion as to the proper factors for consideration in determining whether the giving of the *Allen* instruction constitutes an abuse of discretion, all of which factors were not considered by the Court of Appeals in this case. The custom of giving an instruction urging the minority of the jury to reconsider in view of the fact that a majority have arrived at an opposite conclusion in cases where the jury is deadlocked received its sanction and impetus from the case of *Allen* v. *United States,* 164 U.S. 492, 501, decided by this Court in 1896. That case, however, was reviewed in this Court upon a very meager record, consisting only of the instructions given and assignments of error predicated thereon, and without brief on the part of the appellant. The only issues presented were whether or not certain instructions, including the one herein referred to, correctly stated the law. In only two subsequent cases has the instruction been before this Court on the merits, and both of those cases, *Burton* v. *United States,* 196 U.S.

283 and *Brasfield* v. *United States,* 272 U.S. 448, were concerned with the question of whether or not an inquiry by the Trial Judge as to how the jury was divided before giving the instruction constituted error.

Meanwhile the Courts of Appeals have, piecemeal, through some fifty cases involving this instruction built up a number of tests by which the propriety of this instruction may be determined. In *United States* v. *Samuel Dunkel & Co.,* 173 F. (2d) 506, 508 (C.C.A. 2, 1949), the Second Circuit indicated that the proper test was the examination of all of the facts and circumstances surrounding the giving of the charge. Some Courts appear to require that, along with the so-called *Allen* instruction, additional charges be given as to the presumption of innocence, the burden of proof, and the requirement that guilt be proved beyond a reasonable doubt (*Berger* v. *United States,* 62 F. (2d) 438, 440 (C.C.A. 10th, 1932), approving the giving of a supplemental instruction in a case where the original instructions on those points were re-read in connection with the *Allen* instruction (*Culp* v. *United States,* 131 F. (2d) 93, 101 (C.C.A. 8th, 1942). Other Courts, in determining the possible effect of a supplemental instruction, have looked to the nature of the verdict returned, and interpreted verdicts of not guilty as to some defendants and some counts together with verdicts of guilty as to others after the giving of a supplemental instruction, as raising an inference of compromise and therefore coercion (*Peterson* v. *United States,* 213 Fed. 920 (C.C.A. 9th, 1914) and *Edwards* v. *United States,* 7 F. (2d) 598 (C.C.A. 8th, 1925). This is in direct conflict with the significance attached to such a verdict by the Court of Appeals here (R. 352-353). Under these circumstances, the necessity for a comprehensive determination by this Court of the

factors to be considered in giving this type of supplemental instruction is clear.

(b) The Court of Appeals misapplied the decision of this Court in *Allis* v. *United States,* 155 U. S. 117, 123. Almost all of the cases consider the time which the jury has deliberated as being significant, such a consideration stemming from the decision of this Court in *Allis* v. *United States, supra.* Examination of the opinion of the Court of Appeals here (R. 353) indicates that a deliberation of more than three hours was considered sufficient. In the *Allis* case, this Court stated that there was nothing in the record to show that the Court abused its discretion or failed to wait a reasonable time for the jury to deliberate; here, however, the Trial Judge, in chambers, expressed his opinion that the jury could not possibly have gone over all of the evidence in the case (R. 295). It seems clear from the comments of this Court in *Allen* v. *United States,* 164 U.S. 492, 501 that the *Allen* instruction contemplates that the minority shall reconsider their own views in the light of the intelligent and informed opinion of their fellow jurors. Until the jury has an opportunity to review all of the evidence thoroughly and to hear and consider each other's arguments on all of the issues in the case, the giving of the *Allen* instruction will not accomplish its object. Thus, when the record discloses that the Trial Judge believed that such was not the case, the doctrine of the *Allis* case alone would require an opposite result.

(c) This instruction is so crucial in criminal cases that the circumstances under which it may be given are a question of great importance in the administration of justice and should be decided by this Court. Anglo-Saxon criminal jurisprudence has been founded, historically, on the presumption of innocence and the re-

quirement that the guilt of the accused be proven beyond a reasonable doubt. The increasing efficiency of the law-enforcing agencies of the Federal Government, together with the wide-spread popular belief in their infallibility, sponsored by fiction, radio, television and the press, has resulted in a lessening of the effect of these presumptions, particularly in the minds of jurors (*Cf.* 4 Barron, *Federal Practice & Procedure* p. 441). Under these circumstances, the effect of the *Allen* instruction, logically, is to reinforce the convictions of the majority of the jurors, who are apt to be predisposed to believe that the defendant must be guilty, otherwise the Federal government would never have brought the proceedings. This Court, under its power to regulate the procedure in the Federal courts, has intervened in the interests of insuring criminal defendants a fair trial, *McNabb* v. *United States,* 318 U.S. 332, 340. In the light of the practical diminution in the effect of the presumption of innocence since the decision in *Allen* v. *United States,* 164 U.S. 492, in 1896 and the recognition by this Court in *Burton* v. *United States,* 196 U.S. 283, 307 that "a slight thing may have determined the balance against the accused" with respect to the giving of supplemental instructions, the circumstances under which the *Allen* instruction may properly be given should be reviewed and limited by this Court in the interests of justice.

2. The construction placed on Rule 30 of the Rules of Criminal Procedure by the Court of Appeals presents an important question concerning the construction of this rule which should be determined by this Court and sanctions a departure from the usual course of judicial procedure in Federal Criminal Cases.

(a) The holding that Rule 30 prevented consideration of the substantive error alleged in the supplemental instruction, under the circumstances of this case, raises a

question as to the meaning of the phrase "Opportunity shall be given to make the objection out of the hearing of the jury." The Rule requires that objections be made specifically before the jury retires to consider its verdict. Since the language requiring that opportunity be given to make objections out of the presence of the jury is mandatory, the Rule apparently requires that the Trial Judge take the initiative by asking counsel if he desires to be heard out of the presence of the jury. This construction is supported by the reasoning of the only case to comment on the significance of this sentence, *Lovely* v. *United States,* 169 F. (2d) 386, 391 (C.C.A. 4th, 1948). There the Court noted that failure to observe the requirement that objections be made out of the presence of the jury would be sufficient grounds for granting a new trial since counsel should not be required to place themselves in an attitude of apparent antagonism to the Court such as is involved in excepting to instructions. Particularly, where the objection is to a critical supplemental instruction, even a request by counsel to be heard outside of the presence of the jury before it retires, after the Trial Judge has already directed them to retire has the effect condemned in the *Lovely* case.

Counsel therefore contended, in the Petition for Rehearing, that the failure of the Trial Court to follow this construction of the rule negated the requirement that specific objections be made to the instruction before the jury retires, particularly where, on motion for new trial, the Trial Judge indicated that he assumed the opportunity afforded counsel to object before the charge was given was sufficient, (R. 360-362). This contention was not accepted by the Court of Appeals.

No citations are necessary as to the number of cases in which the lack of a specific objection furnishes the

grounds for the rejection of a contention made by appellants; in the interests of the orderly administration of justice, therefore, it is necessary that this Court prescribe the procedure to be followed by the lower Federal Courts in administering this Rule and entertaining objections to instructions under it.

(b) The construction placed on Rule 30 by the Court of Appeals sanctions a variance from the usual judicial custom in Federal Courts with respect to the entertaining of instructions. In this case, the Trial Judge directed the jury to retire immediately after giving the instruction and without any remarks to counsel prior thereto (R. 300). It is sufficient to note here that the usual practice is to give the instruction, inquire of counsel if they wish to be heard outside of the presence of the jury, and, in the event of a negative answer, to then excuse the jury. In view of the burden placed upon counsel by the provision that objections shall be made before the jury retires, this procedure, which has the effect of making the record show the equivalent of an affirmative approval of the instructions, seems reasonable, and, for the reasons previously mentioned, any deviation from it is of sufficient importance to be considered and passed upon by this Court in the interests of securing a uniform practice among all of the Federal Courts.

3. The decision of the Court of Appeals that it was without power to pass on the merits of the substantive error alleged in the supplemental instruction conflicts with the decisions of this Court, the decisions of other circuits, and other decisions by another panel of judges of the same circuit. The opinion of the Court of Appeals (R. 352) clearly indicates that the court felt it was without power to consider the substantive objection that the addition of the phrase directing the jury to continue its

deliberations until it arrived at a unanimous verdict to the *Allen* instruction coerced the individual jurors because of the lack of a specific objection. Further examination of the cases cited by that Court indicate that it based its decision on Rule 51 of the Rules of Civil Procedure since they are all civil cases. Although the text of the two rules is identical, the following cases all hold that, both because of Rule 52(b) and independently of it, the Court, under Rule 30 of the Federal Rules of Criminal Procedure, has discretion to consider substantial errors affecting the rights of the defendants because their liberty is involved: *Madsen* v. *United States,* 165 F. (2d) 507 (C.C.A. 10th, 1947); *United States* v. *Rappy,* 157 F. (2d) 964 (C.C.A. 2d, 1946); *United States* v. *Levi,* 177 F. (2d) 827, 831 (C.C.A. 7th, 1949); *United States* v. *Raub,* 177 F. (2d) 312, 316 (C.C.A. 7th, 1949). This contention was presented to the Court of Appeals on Petition for Rehearing (R. 362-365) and its failure to modify its opinion clearly indicates that its decision was based, not upon a refusal to exercise discretion, but upon a conviction that it did not have discretion to consider this objection.

Moreover, this holding conflicts with the holding of this Court in *Brasfield* v. *United States,* 272 U. S. 488 that a failure to particularize exceptions does not preclude the correction of errors, especially where the error affects the proper relations between Court and jury and cannot be remedied by modification of the charge after the harm has been done.

4. The question as to whether or not the addition of the phrase directing the jury to continue its deliberations until it arrived at a unanimous verdict to the *Allen* instruction coerced the individual jurors into surrendering their honest convictions regarding the case is of sufficient importance to the administration of justice to warrant

review by this Court. As previously indicated, the last time this Court was called upon to pass upon the validity of a supplemental instruction was in *Allen* v. *United States,* 164 U.S. 492, 501, decided in 1896. Since that time the principle of a supplementary instruction has found acceptance in approximately fifty cases with but little attention given to determination of the propriety of the individual variants given. The major case containing such a test is *Stewart* v. *United States,* 300 Fed. 769, 785-787 (C.C.A. 10th, 1924) where Judge Sandborn reversed the Trial Court on the grounds that the charge there given so slightingly treated the duty of the individual juror to form and make the verdict express his own view that it was coercive. Some doubt has arisen concerning this case because of the language to the effect that a jury which would be unable to maintain its individual and collective independence against such a charge "would be no better than a sounding board for a judicial whisper," *United States* v. *Olweiss,* 138 F. (2d) 798, 801 (C.C.A. 2d). As has been pointed out, the charge, together with the status of the Federal law-enforcing agencies in the minds of the jurors, inherently prejudices the right of defendants in criminal cases to the full benefit of the presumption of innocence. Add to this the effect of language which threatens to hold the jurors together in a close situation of great conflict of both emotion and opinion until they agree, and an inherently coercive situation develops. In view of the possible conflict in the true test of the validity of such an instruction together with its obvious importance to the rights of criminal defendants, this Court ought to exercise its jurisdiction over the practice in inferior Federal Courts, *McNabb* v. *United States,* 318 U.S. 332, 340, to determine whether or not the charge approved in *Allen* v. *United States,* 164 U.S.

492, 501 (1896) represents the extreme limits to which a Trial Judge may go in such circumstances, if not, in fact, the propriety of over-ruling the *Allen* case on this point.

## CONCLUSION.

For the above and foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK J. MCADAMS, JR.,
*Counsel for Petitioners.*

March 26, 1952 A.D.